

Donald Webster
08/25/03 04:14 PM

To: dwilliams@grenadamfg.com,
cc: "Bozick, John" <John.Bozick@ArvinMeritor.com>, "Winkler, Elaine"
<ewinkler@MHBH.com>, Louis_Crawford@deq.state.ms.us, "Brian A.
Soucy" <bsoucy@gesinc.com>, Doug McCurry/R4/USEPA/US,
cc:
Subject: Grenada Draft Closure Report

Dear Mr Williams;

Enclosed are EPA's official comments on the Closure ~~Plan~~ received August 4, 2003 for the former Chrome Plating Area [SWMU 27] at the Grenada Manufacturing Facility in Grenada, Mississippi.

1. Page 1, Paragraph 1, Line 6- This paragraph states that there were three soil borings in excess of Region 9 PRGs for Hexavalent Chrome, yet Figure 4 appears to show six locations at several different depths. The final report should make it clear that significant contamination is being left in place.
2. Page 1, Paragraph 1, Line 16- This paragraph should make it clear that the reason significant contamination was left in place was that the TCE and Toluene plumes, which are being remediated using source control and a Permeable Reactive Barrier, are found under an occupied building. The concern was that destroying the slab, which acts as a cap, would allow subsurface vapors to enter the building, thus resulting in unsafe levels of TCE for the workers. Here, it would be appropriate to reference the draft indoor air monitoring report which does show somewhat elevated levels of TCE inside the main plant building.
3. Page 1, Paragraph 1- The reference to Figure 4 is out of numerical order. Figures should appear in the appendix in the order that they are cited in the text.
4. Page 5, Future Site Utilization- Last sentence. EPA thinks this sentence should read "In addition, no modifications to the concrete slab may be undertaken that will cause the release of hazardous constituents into the indoor air or other media present at the site, without appropriate controls in place."

Regarding appropriate Institutional Controls for this site. In discussions with your attorney, Mr. Ted Esborn, I have

tried to convey the needs of EPA for the ICs to be tiered and survivable. The facility needs a survivable, legal instrument restricting the land use to industrial only. I think there also needs to be a 'No Dig' restriction or easement

on the portion of the property under the building. The permit will need to be modified to include the ICs which will include continued monitoring, and the permit will make it clear that before the property can be clean closed, the soil contamination must be removed or treated to appropriate [at the time] risk based levels for future use. The 'No Dig' restriction needs to follow the property, independent of the EPA permit. The way I see it, the liability to clean up or treat the chromium, which is above cleanup levels, stays with the owner or operator of the site because the levels present *would have resulted in removal or treatment had the contamination not been under an occupied building*, comingled with a TCE and Toluene plume.

If you have any questions, please call me at 404 562-8469. The response to these comments should be incorporated in the next draft of your closure plan.

Sincerely,

Don Webster

Docket Number 450881

Institutional Controls Matrix				
Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
GOVERNMENTAL CONTROLS	<p>Controls using the regulatory authority of a governmental entity to impose restrictions on citizens or property under its jurisdiction. Generally, EPA must turn to state or local governments to establish controls of this type.</p> <p>For example, a local jurisdiction may zone the site to disallow uses that are incompatible with the remedy.</p>	<p>Do not require the negotiation, drafting, or recording of parcel-by-parcel proprietary controls. This is important with large numbers of distinct parcels, particularly where some of the landowners are not liable parties.</p>	<p>Will almost always have to be adopted and enforced by a governmental entity other than EPA (e.g., state or local governments). Thus, their effectiveness depends in most cases upon the willingness of state or local governments to adopt them, keep them in force, and enforce them over the long term. There may also be enforcement costs for the state or local jurisdiction.</p>	<p>Usually enforced by the state or local government. The willingness and capability of the state or local government to enforce the IC should be given due consideration.</p>

Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
1. Zoning	A common land use restriction specifying allowed land uses for certain areas Example: A local government could prohibit residential development in an area of contamination or limit gardening in certain areas	Zoning can be used to prohibit activities that could disturb certain aspects of a remedy or to control certain exposures not otherwise protected under a remedy.	Zoning ordinances are not necessarily permanent; they can be repealed or local governments can grant exceptions after public hearings. Typical zoning classifications such as “industrial” and “commercial” may not be stringent enough for a remedial context. For example, many zoning ordinances allow land uses below a certain level of intensity (e.g., allowing residential uses in industrial districts.) In addition, existing “blanket” zoning districts may not provide appropriate restrictions for specific remedy considerations, and local authorities may be concerned about potential legal challenges for “spot zoning” when rezoning a single parcel or small group of parcels. Therefore, an amendment to, or creative application of the zoning ordinance may be necessary	Zoning laws may not be fully effective unless they are monitored and enforced over the long term and local governments may not have or be able to commit the resources necessary to such oversight.

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2. Local permits	<p>Special permits outlining specific requirements before an activity can be authorized</p> <p>Example: An ordinance requiring that anyone seeking a building permit in a particular area be notified of contamination</p>	<p>Can take advantage of existing restrictions and apply them to site-specific situations</p>	<p>Often permits are narrowly focused and the requirements can be modified over time.</p>	<p>Effectiveness of enforcement depends on the willingness and capability of the local governmental entity to monitor compliance and take enforcement action.</p>
3. Other police power ordinances	<p>Controls placed on access or use of certain areas</p> <p>Example: Placing bans on fishing and swimming in specified areas</p>	<p>Can take advantage of existing restrictions and apply them to site-specific situations</p>	<p>Bans on fishing or swimming may be communicated through posting of the ordinance. However, postings, by themselves, may not be effective in preventing incidental contact or consumption.</p>	<p>Effectiveness of enforcement depends on the willingness and ability of the local governmental entity to monitor compliance and take enforcement action</p>
4. Ground water use restrictions	<p>Restrictions directed at limiting or prohibiting certain uses of ground water which may include limitations or prohibitions on well drilling.</p> <p>Example: Establishment of ground water management zones or protection areas; capping or closing of wells</p>	<p>Can take advantage of existing restrictions and apply them to site-specific situations</p>	<p>Implementation of such restrictions are dependent on a state's ground water ownership and use laws. Local or state expenditures may be necessary to compensate owners of condemned property.</p>	<p>Effectiveness of enforcement depends on the willingness and ability of the local governmental entity to monitor compliance and take enforcement action</p>

Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
5. Condemnation of property	Taking over title of a property by condemning it under a government entity's eminent domain authority. Example: Taking over title through condemnation to prevent the site from being used.	Used as a way to take title of a property to control land use or impose a desired land use for a public purpose. Property may be condemned under Federal, state, or local authority.	The owner of the property is entitled to compensation, may be recoverable under section 107 of CERCLA.	Not applicable.

Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
PROPRIETARY CONTROLS	Tools based on private property law used to restrict or affect the use of property	<p>Can be implemented without the intervention of any federal, state, or local regulatory authority</p> <p>Advisable when restrictions on activities are intended to be long-term or permanent (contaminants will be left in place that prevent unrestricted use)</p>	<p>Since property laws vary by state, always check whether or not there are court-recognized doctrines that would limit the extent to which the controls run with the land or are transferable to other parties</p> <p>Property law requires a conveyance of a property interest from a landowner to another party for a restriction to be enforceable</p>	<p>To be enforceable in most courts, the instrument used for the conveyance of any property right should clearly state:</p> <ul style="list-style-type: none"> • the nature and extent of the control to be imposed; • whether the control will “run with the land” (i.e., be binding on subsequent purchasers); • whether the right to enforce the control can be transferred to other parties

Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
1. Easements	<p>A property right conveyed by a landowner to another party which gives the second party rights with regard to the first party's land. An "affirmative" easement allows the holder to enter upon or use another's property for a particular purpose. A "negative" easement imposes limits on how the landowner can use his or her own property.</p> <p>Examples:</p> <ul style="list-style-type: none"> Affirmative easement - access by a non-landowner to a property to conduct monitoring Negative easement - prohibit well-drilling on the property by the landowner 	<p>Most flexible and commonly used proprietary control</p> <p>EPA can hold an "in gross" easement since it generally will not own an adjacent parcel of land. An "appurtenant" easement can only be given to adjacent landowners. (Note: the site manager or Regional Counsel should check all applicable state property laws and should not consider "in gross" easements to be transferable).</p>	<p>For an easement to be created there must be a conveyance from one party to another. An easement cannot be established unless there is a party willing to hold the easement. This can present difficulties since EPA cannot hold an easement under the NCP without compliance with all procedures required by section 104(j) of CERCLA. Furthermore, some state governments cannot hold easements, and other parties may be unwilling to do so.</p> <p>Most useful in situations where a single parcel of land is involved and the current owner of the land is subject to regulation under CERCLA or RCRA</p>	<p>In general, an easement is fully enforceable as long as its nature and scope are clear and notice is properly given to the parties against whom the agreements are binding (e.g. by recording the easement in land records)</p> <p>Use caution when determining who will hold the easement. Sometimes PRPs acquire easements from other landowners thus taking on the burden of negotiating and paying for them. However, as a third party, EPA may not have the right to enforce or transfer the easement unless that right is specified in the agreement between the PRP and other landowners.</p> <p>The terms of easements are enforceable by the holder in the state court with jurisdiction over the property's location.</p> <p>Less useful where a large number of parcels are involved and the owners are not PRPs because</p>

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2. Covenants	A covenant is an agreement between one landowner to another made in connection with a conveyance of property to use or refrain from using the property in a certain manner. Similar to easements but are subject to a somewhat different set of formal requirements Example: A covenant not to dig on a certain portion of the property.	Can be used to establish an institutional control where the remediated property is being transferred from the current owner to another party	This agreement is binding on subsequent owners of the land if: (1) notice is given to the subsequent land owner, (2) there is a clear statement of intent to bind future owners, (3) the agreement "touches and concerns" the land, and (4) there is vertical and horizontal privity between the parties. ¹	Enforcement of covenants is subject to state law and enforceable by the holder in the state court with jurisdiction over the property's location.

¹ Horizontal privity means that only a contract party may claim relief for a breach of a contract warranty or a condition. In other words, no person other than the buyer can sue for damages that arise out of the breach of a contract warranty or condition. Vertical privity means that each party in a distribution chain only has a contract with the person ahead of him or her in the chain. For example, vertical privity would mean a consumer only has a remedy against the person from whom he or she purchased a particular item and could not sue the manufacturer.

Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
3. Equitable Servitude	Closely related to covenants, equitable servitudes arose when courts of equity enforced agreements that did not meet all of the formal requirements of covenants.	Most likely to have value as an institutional control where a party responsible for cleanup expects to own neighboring property for a long period (as might be the case in partial military base closures)	The agreement is binding on subsequent owners of the land if: (1) notice is given to the subsequent land owner, (2) there is a clear statement of intent to bind future owners, (3) the agreement "touches and concerns" the land. The third requirement should be met by any agreement that restricts what the owner can do with the land.	The ability to enforce an equitable servitude "in gross" against subsequent landowners is less likely to be recognized compared to easements and covenants, but this depends greatly on jurisdiction. The terms of equitable servitudes are enforceable by the holder in the state court with jurisdiction over the property's location.
4. Reversionary Interest	A reversionary interest is created when a landowner deeds property to another, but the deed specifies that the property will revert to the original owner under specified conditions. It places a condition on the transferee's right to own and occupy the land. If the condition is violated, the property is returned to the original owner or the owner's successors.	Binding upon any subsequent purchasers Most useful where it can be assumed that the original owner will be available over a long period to conduct further response determined to be necessary (e.g., where a Federal agency is selling the property)	Not useful if there is a chance that the original owner will not remain in existence for a long time	Each owner in the chain of title must comply with conditions placed on the property. If a condition is violated, the property can revert to the original owner, even if there have been several transfers in the chain of title. The terms of reversionary interests are enforceable by the holder in the state court with jurisdiction over the property's location.

Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
5. State Use Restrictions	<p>State statutes providing owners of contaminated property with the authority to establish use restrictions specifically for contaminated property</p> <p>For example, Connecticut property owners who wish to file an environmental use restriction must demonstrate that each person holding an interest in the land irrevocably subordinates their interest in the land to the environmental use restriction, and that the use restriction shall run with the land.²</p>	<p>Overrides common law impediments to allow for long term enforceability of real property interests</p>	<p>In some cases, the authority to acquire or enforce the restrictions is conferred only on the state. Therefore, the state's assistance is necessary to implement and enforce.</p>	<p>Determine whether the restriction can be federally enforced; if not, investigate whether the state is willing to take on the role of enforcement</p>

²CT General Statutes, 1997, Vol. 8, Title 22a, Section 22a-133n through 22a-133s, contains the following provision: "No owner of land may record an environmental use restriction on the land records of the municipality in which such land is located unless he simultaneously records documents which demonstrate that each person holding an interest ... irrevocably subordinates such interest to the environmental use restriction. An environmental use restriction shall run with the land, shall bind the owner of the land and his successors and assigns, and shall be enforceable"

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6. Conservation Easements	<p>Statutes adopted by some states that establish easements to conserve and protect property and natural resources</p> <p>Example: Open space or recreational space is maintained to prevent exposure or prevent uses that might degrade a landfill cap</p>	<p>These statutes override common law technicalities and barriers that may pertain to traditional easements and covenants (e.g., “in gross” easements are not upheld in some jurisdictions).</p>	<p>May only be used for a narrow range of possible purposes which could limit their usefulness as institutional controls</p>	<p>In general, the holder must be a governmental body, a charitable corporation, association, or trust</p>

Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
1. Administrative Orders	<p>An order directly restricting the use of property by a named party</p> <p>An order also can be used to restrict the use of land owned by a <i>non-liable party</i>. This approach would be used if no other method (e.g., proprietary control, governmental control) is successful (see limitations).</p> <p>Example: An order prohibiting the transfer of drums off site or dredging in a containment area.</p>	<p>EPA has broad scope of authority to issue orders to protect public health and the environment (section 106 of CERCLA)</p> <p>Can be implemented without the execution of any further property instruments</p> <p>Can include provisions requiring the property owner to disclose the order's existence to any potential purchaser or lessee, and notify EPA of any anticipated change in ownership, the identities of any potential purchasers or lessees.</p>	<p>Does not bind subsequent owners or parties not named in the order (e.g., lessees). However, depending upon the facts of the case, an environmental regulator may have the authority to issue a new order to the new owner.</p> <p>An order to restrict a <i>non-liable party</i>, may result in a claim for compensation under section 106(b).</p>	<p>Enforcement is by EPA (or state if issued under state authority).</p> <p>Creates the threat of potential penalties for violations as an incentive to property maintain the control</p>

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2. Consent Decrees	A CD is signed by a judge and documents the settlement of an enforcement case. Similar to an Administrative Order, it is used to specify restrictions on use of land by the settling party. Example: No well drilling on the property.	Can be used to require a settling party to: 1. file a separate instrument conveying a proprietary control, such as an easement or covenant to EPA or a third party; 2. notify successors-in-title of the CD, site, and any easements; 3. notify EPA of any anticipated change in ownership and the name and address of the potential purchaser or lessee; and 4. can be used to require settling non-property owners (PRPs) to attempt to obtain easements from parties that own land contaminated by the PRP in order to restrict land or resource use.	CDs alone are not binding on subsequent owners and occupants.	Enforced by EPA (or state if issued under state authority); failure to comply can result in penalties. ³

³While EPA may not be able to enter into CDs with federal agencies, states can.

Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
INFORMATIONAL DEVICES	Tools, which often rely on property record systems, used to provide public information about risks from contamination	May effectively discourage inappropriate land users from acquiring the property Easier to implement than other controls because they do not require a conveyance to be negotiated	Has little or no effect on a property owner's legal rights regarding the future use of the property If not drafted well, informational devices may discourage appropriate development and uses of land	Not legally enforceable

Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
1. Deed notices	<p>Commonly refers to a non-enforceable, purely informational document filed in public land records that alerts anyone searching the records to important information about the property.</p> <p>Example: Notice may state that the property is located within a Superfund site, identify the kinds of contaminants present and the risks they create, or describe activities that could result in undesirable exposures to the contaminants left on site.</p>	<p>May discourage inappropriate land use</p> <p>Easier to implement than easements because they do not require a conveyance to be negotiated</p> <p>Use only as a means of alerting and informing the public about information related to a particular piece of property</p>	<p>Because deed notices are not a traditional real estate interest, proper practice in using them is not well established. Investigate state law and local practice in advance to determine whether such a notice will be recorded, how it should be drafted, and who would be entitled to revoke it.</p>	<p>A deed notice is not an interest in real property, so recording a notice has little or no effect on a property owner's legal rights regarding the future use of the property (i.e., they are non-enforceable).</p>

Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
2. State registries of hazardous waste sites	<p>Registries containing elements that can be used as institutional controls</p> <p>Examples: Compilation of hazardous waste sites in the state; annual reports summarizing the status of each site on the registry; notice with the deed for sites on the registry that the site is contaminated; and the requirement that any person conveying title to property on the registry to disclose to all potential purchasers the fact that the property is on the registry</p>	<p>With the cooperation of the state, registries can be useful with other measures as part of an overall remedy, especially in providing information to the public.</p> <p>Some laws provide that the use of a property on the registry cannot be substantially changed without state approval.</p>	<p>The procedure for listing and removing sites from registries is solely at the state's discretion</p>	<p>Any requirements are only enforceable by the state</p>

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3. Advisories	<p>Warnings that provide notice to potential users of land, surface water or ground water of some existing or impending risk associated with their use. Advisories are usually issued by public health agencies, either at the Federal, state or local level.</p> <p>Example: An advisory issued to owners of private wells in a particular area that contamination has been detected in the ground water</p>	<p>Can be useful with other measures as part of an overall remedy, especially in providing information to the public.</p>	<p>These types of warnings, by themselves, are not likely to prevent incidental contact or consumption. Use advisories also have a very short useful life and must continually be enforced.</p>	<p>Advisories do not have any legal effect nor do they create any enforceable restrictions.</p>